Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 4 '96

In the Matter of

Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996

CS Docket No. 96-85

DOCKET FILE COPY ORIGINAL

COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE CONSUMER PROJECT ON TECHNOLOGY, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY

The Alliance for Community Media, the Consumer Project on Technology and the Alliance for Communications Democracy ("Alliance") respectfully submit the following comments in response to the Order and Notice of Proposed Rulemaking, FCC 96-154, in the above-captioned proceeding, released April 9, 1996 ("NPRM"). The Commission seeks comments on proposed final rules implementing certain provisions of the 1996 Telecommunications Act[1] ("1996 Act") affecting Title VI of the Communications Act of 1934.[2] The Alliance addresses the two issues that most directly affect its mission of advancing democratic ideals by ensuring everyone's access to electronic media, and by promoting effective communication through community uses of media.

The Alliance for Communications Democracy is a membership organization comprised of non-profit access corporations in communities around the country. Either alone or through its members, the organization has helped thousands of individuals use the access channels that have been established in their communities.

The Consumer Project on Technology was created by Ralph Nader in 1995 to investigate a number of consumer issues which are related to the development of new technologies, including information technologies.

The Alliance for Community Media is a national membership organization comprised of more than thirteen hundred organizations and individuals in more than seven hundred communities. Members include access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others involved in public, educational and governmental ("PEG") access programming around the country. The Alliance assists in all aspects of community programming, from production and operations to regulatory oversight.

No. of Copies rec'd 0+9
List ABCDE

[1] P.L. 104-104, 110 Stat. 56 et seq. (February 8, 1996).
[2] 47 U.S.C. §§ 521 et seq.

I. "AFFILIATE" SHOULD BE DEFINED BROADLY FOR OVS AND CABLE-TELCO BUYOUTS.

Paragraph 95 of the NPRM requests comments regarding the definition of "affiliate" for purposes of implementing the provisions of Section 302(a) of the 1996 Act establishing "open video systems" ("OVS"). The Alliance urges the Commission to define "affiliate" as broadly as possible for such purposes. In the context of these provisions, a broad definition of affiliation is more likely to guarantee that the statute offers the public the opportunity to receive information from diverse and antagonistic sources.[3] The First Amendment requires the Commission to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.."[4] Defining "affiliate" in such a way as to allow OVS platform operators, cable operators, and LECs to avoid restrictions placed on the activities of associated entities from which they receive revenue does not carry out the clear meaning of the statute or serve the purposes of the First Amendment.

A. TWO-THIRDS OF OVS PLATFORM SPACE IS RESERVED FOR NON-AFFILIATED ENTITIES.

The definition of "affiliate" may control what television viewers see and hear on OVS platforms. Section 653(b)(1)(B) of the 1996 Act requires an OVS platform operator to limit its own use of the platform (including any use made by its affiliate) to one third of capacity, if demand exceeds supply. Needless to say, an unsuitably narrow definition of "affiliate" would allow an OVS operator to continue to exercise editorial and financial control over entities that are formally "unaffiliated" for purposes of this provision. This would subvert the very purpose of the open platform itself, which is to offer meaningful access to unaffiliated third-parties.

Consequently, it is vital to the success of OVS that the Commission not create circumstances which will allow an OVS operator to retain control over the platform while meeting the facial requirement of any regulation promulgated by the agency. Joint ventures, side deals, and marketing arrangements between formally non-affiliated entities will create market conditions which have the effect of discouraging or preventing truly unaffiliated

---

[3] Associated Press v. United States, 326 U.S. 1, 20 (1945).
[4] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1968).

programmers from demanding space on the OVS platform. We urge the Commission to adopt regulations which recognize that contractual arrangements through unaffiliated companies may hide affiliations which are not revealed by an "equity" ownership test. The Alliance is particularly concerned that favorable terms and conditions offered some entities but not others would likely create "de facto" affiliation, by manipulating such terms and conditions so as to gain editorial control over the entire system, in clear contravention of the statute's intent.

B. AFFILIATION SHOULD BE DETERMINED BY LOOKING AT THE ENTIRETY OF THE BUSINESS RELATIONSHIP BETWEEN THE ENTITIES.

The Alliance does not believe that the interpretation of "affiliate" found in Section 3 of the 1996 Act[5] sufficiently protects would-be unaffiliated programmers from manipulation of the system by OVS providers. The statute defines affiliation as any ownership or controlling interest in a company, and defines ownership as an equity interest in excess of ten percent. But there is significant danger of abuse under this standard, because an OVS operator may still be able to favor some "unaffiliated" programmers over others for editorial and/or marketing purposes. The Alliance supports a definition of "affiliate" which encompasses anything beyond a carrier-user relationship.

Because of the significant danger of abuse, the Alliance recommends that in every circumstance where an OVS operator has contracted with an entity it certifies is an unaffiliated programming provider, that the Commission examine the contracts between the operator and the programming provider. The Commission should also require the operator and the program provider to disclose any additional contracts between the operator and the provider, as well as any contracts between the OVS operator's and the programmer's affiliated entities. These measures are necessary to ensure that the OVS platform operator is creating more favorable business conditions for some unaffiliated programmers than for others, manipulating demand for OVS capacity and exercising unauthorized control over the system.

[5] 47 U.S.C. § 153(33).

II. THE REACH OF SECTION 506 SHOULD NOT EXCEED THE 'ERZOZNIK' STANDARD.

The Alliance agrees with the tentative conclusion of the Commission that its discretion with regard to the definition of "nudity" under Section 506 of the 1996 Act[6] is limited by the U.S. Constitution.[7] Erzoznik v. City of Jacksonville,[8] the controlling case on this issue, declares that nudity is protected by the First Amendment, and must be considered as part of the work as a whole.[9] As the Commission notes, the statute and rules regulating indecency on PEG access channels are themselves sub judice before the Supreme Court in Denver Area Educational Television Consortium v. FCC and Alliance for Community Media v. FCC[10] in which a ruling is expected shortly. The Alliance supports the Commission's decision to stay the effect of Section 506 and rules promulgated thereunder while the stay in Alliance remains effective.[11]

The Alliance considers Section 506, and any regulations that are promulgated thereunder, to be unconstitutional for reasons that are at issue before the Supreme Court in the Denver Area and Alliance cases. Section 506 disfavors certain constitutionally protected speech (non-obscene "indecent material" and "nudity"), because the law (a) fails to use the least restrictive means to further a compelling state interest; (b) imposes content-based restrictions solely upon those who speak via cable access channels; (c) is unconstitutionally vague; and (d) imposes prior restraints without proper judicial safeguards.

If the Alliance's view does not prevail before the Supreme Court, the Alliance would agree with the Commission's tentative conclusion to interpret the term "nudity" as used in Section 506 as meaning nudity that is obscene or indecent.

Respectfully Submitted,

Jeffrey S. Hops
Director of Government Relations
Alliance for Community Media
666 11th Street, N.W., Suite 806
Washington, D.C. 20001-4542
(202) 393-2650

---

[6] Codified at 47 U.S.C. §§ 531(e), 532(c)(2).
[7] NPRM at ¶ 111.
[8] 422 U.S. 205 (1975).
[9] Id. at 211 n. 7 (citing Miller v. California, 413 U.S. 15, 24 (1973)).
[10] U.S. Supreme Court Dk. Nos. 95-124, 95-227, argued February 21, 1996.
[11] NPRM at ¶ 67.

James Horwood, Esq.
Spiegel & McDiarmid
1350 New York Ave., N.W.
Suite 1100
Washington, D.C. 20005
(202) 879-4000

June 4, 1996